

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CRUZ DEMPSEY

Claimant

VS.

UNIVERSITY OF KANSAS HOSPITAL

Respondent

AND

SAFETY FIRST INSURANCE COMPANY

Insurance Carrier

Docket No. 1,020,989

ORDER

Claimant requests review of the January 15, 2008 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard (ALJ).

ISSUES

The ALJ denied claimant's request for an independent medical examination to evaluate her need for psychiatric treatment. The claimant has appealed this determination alleging only that the ALJ erred in making certain findings as to the extent of her injuries and in misinterpreting a written report authored by Dr. Egea. Claimant requests that the Board "modify the Administrative Law Judge's decision". Respondent maintains that this preliminary decision is not subject to appeal at this juncture of the claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant alleges she tripped over a box and landed on her knees on September 9, 2004. Claimant further alleges that her injury continues each and every day thereafter as she continues to perform her regular work duties. Her claim has been the subject of two earlier preliminary hearings which yielded an Order authorizing a physician to evaluate claimant and determine her course of treatment. More recently and at her counsel's request, claimant was evaluated by Dr. Fernando Egea who has concluded that "[t]he last and 3rd injury of December 4, 2006 is in my opinion the one that caused of [sic] her

depression.”¹ There is no evidence within the file as to a specific injury occurring on December 4, 2006.

After a brief hearing, during which the parties agreed that the earlier preliminary hearing transcripts and claimant’s own deposition testimony could be considered, the ALJ issued an Order that included the following findings of fact:

1. Claimant makes claim for a series of accidents commencing September 9, 2004, when she fell at work, through the date of hearing January 8, 2008 and continuing.
2. Claimant testified at her deposition [that] she sustained injury to both her right and left knees on September 9, 2004.
3. The Neuropsychiatric Evaluation dated April 23, 2007 and a supplemental report dated November 5, 2007 indicates claimant’s depression was caused by her December 4, 2006 injury. There is no testimony by claimant regarding an injury on that date.²

Based on these findings, the ALJ denied claimant’s request for the appointment of a court appointed examiner.

Claimant has appealed this Order and in her application, she states the basis for her appeal as follows:

Item No. 2 of such Order states “Claimant testified at her deposition she sustained injury to both her **right and left knees** on September 9, 2004; **Claimant’s testimony, in fact reveals that the injuries she testified to were as follows: both upper extremities, both lower extremities, neck, upper and lower back with other areas to be determined.**

Item No. 3 of such Order states, “The Neuropsychiatric Evaluation dated April 23, 2007 and a supplemental report dated November 5, 2007 indicates claimant’s depression was caused by her December 4, 2006 injury. There is no testimony by claimant regarding an injury on that date.” While it is true that Claimant did not testify to any injury on that date, Dr. Egea’s Supplemental Report of November 5, 2007 also specifically states that the “ ... **3rd injury**...” was the one that caused Claimant’s depression.”³

¹ Cl. Ex. 2, Dr. Egea’s letter dated November 5, 2007.

² ALJ Order (Jan. 15, 2008).

³ Application for Review at 1-2. citations omitted (emphasis in original).

Essentially what claimant argues is that the ALJ erred in his recitation of the extent of her alleged injuries and in his interpretation of Dr. Egea's report. Stated another way, claimant asserts that the ALJ "erred in overlooking all the parts of the body applicable to such September 9, 2004 injury" and "in failing to accurately read Dr. Egea's findings and correctly apply such to the current injury, which is the subject of this Appeal."⁴

As a preliminary matter, this Board Member must consider whether there is jurisdiction to consider this matter. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.⁵

Here, the parties have stipulated (for preliminary hearing purposes) that claimant sustained a compensable accident. So, none of the jurisdictional items numerically listed above are implicated and can't be used as a jurisdictional basis for review. And claimant has not asserted that the ALJ exceeded his jurisdiction in denying claimant's request. All that is alleged in this appeal is that the ALJ mistakenly recited the extent of claimant's injuries in his Order (referencing only bilateral knee injuries) and that he misinterpreted the contents of the neuropsychiatric report (which concluded that claimant's depression was attributable to a December 4, 2006 accident, a date that claimant maintains is a typographical error).

This Board Member finds that claimant's appeal, on its face, does not present issues for which there is jurisdiction at this juncture of the claim. The ALJ has the authority to make findings of fact with respect to the nature and extent of claimant's injury following

⁴ Claimant's Brief at 1-2 (filed Feb. 11, 2008).

⁵ See K.S.A. 44-551.

a preliminary hearing and those findings are not subject to review by the Board.⁶ When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁷

Nonetheless, when read rather broadly, a portion of claimant's appeal presents an issue that is jurisdictional. Claimant argues that the ALJ misread Dr. Egea's report with respect to the accident date. What claimant more accurately is arguing is that her need for the psychiatric treatment outlined by Dr. Egea is attributable to her series of accidents.

The issues of whether an injury or particular medical treatment is related to a compensable work-related accident are preliminary hearing issues that the Board is empowered to review as they address the compensability of an alleged injury. The question of whether a psychological condition is directly traceable to the work-related accident is a question that goes to the compensability of the condition. Stated another way, it gives rise to a disputed issue of whether the psychological condition arose out of and in the course of employment.⁸

Here, although not clearly articulated, claimant is arguing that the contents of Dr. Egea's report, if read in the context of the purported typographical error, supports her assertion that her present need for treatment arises out of her work-related injury and is directly traceable to that event. Thus, the issue posed to the ALJ was not just whether claimant should have the treatment, but also whether her need for that treatment was attributable to a work-related event.

The ALJ concluded, based on Dr. Egea's own statements, that claimant's apparent need for treatment was not caused by her work injury. His order makes that very clear. After considering the entire record, this Board Member finds that the ALJ's conclusion should be affirmed. While there may be some sort of typographical error in Dr. Egea's report, that issue should be explored by the parties. It is simply unwise to ask a factfinder to take such a leap of faith as to the causative aspects of claimant's need for psychiatric treatment without some sort of explanation as to the source of his belief that there was an accident on December 4, 2006. Accordingly, that aspect of the ALJ's Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁹ Moreover, this review

⁶ *Fuller v. American Legion Ball McColm Post No. 5*, Nos. 1,031,973 and 1,031,974, 2007 WL 2586186 (Kan. WCAB Aug. 30, 2007).

⁷ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁸ *Hansen v. Whole Foods Market*, No. 1,026,667, 2006 WL 2632025 (Kan. WCAB Aug. 31, 2006).

⁹ K.S.A. 44-534a.

on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the appeal from the January 15, 2008 Order of Administrative Law Judge Steven J. Howard is dismissed in part and affirmed in part.

IT IS SO ORDERED.

Dated this _____ day of March 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge